FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 459

DONALD M. JOHNSON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR REHEARING

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To the Honorable, the Chief Justice and Associate Justices of Supreme Court of the United States:

Donald M. Johnson, Petitioner, respectfully prays that he be granted a rehearing in the matter of his Petition for Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, which Writ was denied by your Honorable Court on January 12, 1948, and as grounds for such rehearing sets forth the following:

1. In his Petition for Writ of Certiorari, the said Donald M. Johnson alleged as a reason for the allow-

ance of the Writ that the decision of the said Circuit Court was in conflict with the decisions of this Court relative to the requirement that an overt act be committed within the statutory period in order to convict him of conspiracy under 18 USCA §88.

2. In its Brief, page 58, the Government stated that the following overt acts were proven to have been committed within the statutory period:

(1) Greenes' sending of the $350 check; (2) Michael's commission of perjury before the Grand Jury; (3) Michael's filing of his First and Final Account as Trustee in the Central Forging case; and (4) Judge Johnson's sentencing of Koppelman.

3. In its said Brief, page 58, the Government admitted that the jury was instructed by the Trial Judge that in order to convict they must find "an overt act as charged", and that two of the overt acts were not alleged in the Indictment, and therefore were not before the jury as overt acts; said two alleged overt acts are (1) Greenes' sending of the $350 check to Johnson on or about October 2, 1942; and (2) Michael's commission of perjury on August 24, 1944.

4. The third alleged overt act, namely, Michael's filing of his Account in the Central Forging case, was not available against Donald M. Johnson because the Trial Judge expressly so ruled in his Charge to the Jury (889a), and the Circuit Court of Appeals decided that the said matter of Michael's filing could not be used against your Petitioner (1226).

5. The fourth alleged overt act, namely, the sentencing of Koppelman, was not available likewise against Donald M. Johnson because it was proven only by the testimony of Jacob Greenes, co-defendant, before the Grand Jury, which testimony was read into the record in this case; it was admitted only against Greenes, and so limited by the Trial Judge in his Charge (868a). The Circuit Court also decided that the Koppelman matter having been proven only by Grand Jury admissions was available against the person who made the admission, namely, Greenes, and therefore, not against Donald M. Johnson (1226).

6. The Government in its Answer, at page 59-60, states that the fourth of the above-listed overt acts, namely the Koppelman matter, was both alleged and proved, and was admissible against all defendants. This is a misstatement of the fact. The Koppelman matter was proven as above-indicated, only by the Grand Jury testimony of Greenes, and was by the Court limited to Greenes, and the Circuit Court in its Opinion so considered the matter.

7. The only alleged overt act within the statutory period proven against Donald M. Johnson was the sending of the $350 check from Abe Greenes to him, and admittedly this matter was not before the jury as an overt act, not having been charged as such in the Indictment, and therefore the ruling of the Circuit Court that the jury might base its conviction of Donald M. Johnson upon this incident was without legal foundation.

8. We respectfully submit that this admission by the Government in its Brief (service of which was accepted by the attorney for the Petitioner on January 9, 1948) that the Trial Judge required the jury to find such overt acts as were alleged as overt acts in the Indictment, and that the sending of the $350 check was not alleged in the Indictment, is such an intervening circumstance of controlling effect as to require a rehearing in this case, there being no competent and admissible evidence to connect Petitioner with any overt act charged in the Indictment after September 11, 1942.

9. The argument made by the Government that it could have proven acts not alleged in the Indictment and that the jury could have based its verdict upon such acts is correct in the abstract, but in this case the jury was required to follow the instruction of the Trial Judge, and therefore to find an overt act as charged and not some other act which might appear somewhere in the proof, and therefore it did not consider such other acts.

10. The Government also points out in the footnote, on page 60, of its Brief, that the Statute of Limitations was tolled during the War, and therefore the crucial date, September 11, 1942, was not correct, and that this matter was evidently overlooked at the trial. Regardless of the fact that the tolling of the Statute of Limitations was overlooked, the record shows that for the purpose of this case at least the Statute was not tolled because it was the duty of the Government's attorneys to call that matter to the attention of the court if they intended to rely upon such tolling of Statute.

Not having done so, the Government cannot now complain. As we attempted to show in our Petition and Brief, the jury was bound by the law as given to them by the Trial Judge in his Charge; to this point, the Government wholly fails to reply.

11. A further reason for granting a rehearing is that since the filing of our Petition the Supreme Court has handed down its Opinion, on January 5, 1948, in the case of *Robert Sealfon v. United States,* at 174 October Term, 1947, reversing his conviction. This decision bears on the question of res adjudicata, viz, that *all* of the facts which had been proven in the Central Forging Company case, in which a verdict of acquittal was entered as to Donald M. Johnson, were res adjudicata in the present case. The Circuit Court, in our case, stated that the law as quoted on the question of res adjudicata was correct, but refused to apply it to the facts of our case. One of the objections raised by Petitioner at the trial was that he was not permitted to show the facts which had been proven in the Central Forging case, and to read that record into the evidence so that the jury might compare those facts with the facts which were being submitted by the Government on the same matter. In our case, the Trial Judge merely told the jury that *any overt act* which was alleged in the Indictment in the Central Forging case and which was alleged also in the Indictment in the present case could not be considered against Donald M. Johnson. In speaking of res adjudicata, this court says in the Sealfon case that the question is "whether the jury's verdict in the conspiracy trial was a determination favorable to

the Petitioner of the *facts* essential to the conviction of the substantive offense. This depends upon the *facts* adduced at each trial, and the instructions under which the jury arrived at its verdict at the first trial." In our case, the question is whether the verdict in the Central Forging case was a determination favorable to Petitioner of the *facts* essential to conviction in the present case. It will be noted that the word "facts" is used and not "overt acts", and this is the whole foundation of our complaint of the action of the Trial Court in this regard: that it limited the comparison to *overt acts*, and refused to consider the *facts* of the cases.

Respectfully submitted,

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CERTIFICATE

I, Charles J. Margiotti, counsel for Donald M. Johnson, Petitioner, hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and further, that the Petition is restricted to the grounds specified in Amended Rule 33 (2), viz., intervening circumstances of substantial or controlling effect, being the admissions of the Government in its Answer relative to overt acts, which show that there was no overt act which the jury could legally find against this Petitioner, and, therefore, his conviction was in violation of 18 USCA §88, and also the misstatement of the Government that testimony relative to the Koppelman case was available against all defendants; and secondly, the filing of the Opinion of the Supreme Court in the Sealfon case, after the Petition for Writ of Certiorari had been filed.

CHARLES J. MARGIOTTI,
Counsel for Petitioner